No. 530

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In the Supreme Court of the United States

October Term, 1957

TSEUNG CHU, also known as BOW QUONG CHEW, also known as TSEUNG BOWQUONG CHEW, also known as THOMAS BOWQUONG CHEW, PETITIONER

v.

GORDON L. CORNELL, Acting Officer in Charge of UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, at Los Angeles, California

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (R. 68). The opinion of the District Court is not reported (R. 46).

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1957 (R. 85). The petition for a writ of certiorari was filed on October 4, 1957. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of willfully evading the payment of federal income taxes constitutes a conviction of a crime involving moral turpitude.

2. Whether petitioner was under a duty to disclose the fact of the conviction in his application for an immigration visa.

3. Whether the phrase "crime involving moral turpitude" has a sufficiently definite meaning to afford a constitutional standard for deportation of petitioner.

STATUTES INVOLVED

Title 26 U.S.C. Section 145(b) (Internal Revenue Code of 1939), insofar as pertinent, provides as follows:

> Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty of a felony * * *.

Title 8 U.S.C. Section 1182(a)(9) and (19) (Immigration and Nationality Act of 1952), insofar as pertinent, provides as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * *

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) * * *

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact; * * *.

STATEMENT

Petitioner, an alien and native of China, was ordered deported from the United States by a Special Inquiry Officer on December 7, 1954, on the ground that he was excludable at the time of his last entry in that he had (1) been convicted of a crime involving moral turpitude, and (2) had procured a visa for his last entry by willfully misrepresenting a material fact in violation of 8 U.S.C. 1182(a) (R. 21-27). The order of deportation was sustained on appeal to the Board of Immigration Appeals on October 3, 1955 (R. 8).

Petitioner's last entry into the United States was on August 11, 1953 (R. 22). It was shown at the deportation hearings that on March 27, 1944, in the United States District Court for the Southern District of California, petitioner had been convicted upon his plea of *nolo contendere* of willfully attempting to evade and defeat the federal income tax in violation of 26 U.S.C. 145(b) (Internal Revenue Code of 1939) (R. 23). It was also shown that one of the questions on the application for a visa into the United States issued to petitioner on April 15, 1953, read as follows:

I have never been arrested; convicted; in prison; in an almshouse; treated in an institution, hospital, or other place, for insanity or other mental disease; the beneficiary of a pardon or amnesty, except as hereinafter stated.

To this petitioner replied "None" (see R. 70).[1]

On November 4, 1955, petitioner filed in the United States District Court for the Southern District of California a complaint seeking a declaration that the order of deportation was void (R. 3). The District Court upheld the validity of the order (R. 52), and the judgment was affirmed by the Court of Appeals (R. 84).

ARGUMENT

1. The issue in this case is whether the crime of which petitioner stands convicted is one involving moral turpitude—not whether fraud is an essential element of the crime of willful income tax evasion. It is the government's position that the willful evasion of federal income taxes is a crime involving moral turpitude whether or not it is also fraud, and that the order of deportation may properly be sustained on such ground.

Section 145(b) of the 1939 Internal Revenue Code requires that the tax evasion be done "willfully." "Willfully," in this context, means something more than voluntarily. It means bad faith, "bad purpose," or "evil motive." *United States* v. *Murdock*, 290 U.S.

[1] The interim opinion of the special inquiry officer, in which this aspect of the case was discussed, has not been included in the record.

389; *Spies* v. *United States*, 317 U.S. 492; *Wardlaw* v. *United States*, 203 F. 2d 884 (C.A. 5).

This bad or evil purpose takes the act of willful income tax evasion out of the realm of ordinary willful acts. The existence of an evil motive, like the fraud present in *Jordan* v. *DeGeorge*, 341 U.S. 223, labels the crime of willful income tax evasion as one involving moral turpitude. It is immaterial whether fraud as such is an element of the offense.[2] There are crimes clearly involving moral turpitude, like murder, which do not involve fraud. The point is that the evil motive required by the statute is, like fraud, sufficient to show the existence of moral turpitude in a particular act, but on the other hand that fraud is not a necessary factor.

Because an essential element of the crime of willful income tax evasion is the existence of an evil motive, the mere record of conviction will suffice to brand the petitioner's conduct as involving moral turpitude. Neither the indictment nor the plea is necessary to determine if an individual's acts involve moral turpitude. Thus, the apparent conflict alleged by petitioner (Pet. 13) as to what allegations in an indictment may be considered by a reviewing court to determine if moral turpitude is present is never reached here.

2. In response to a question on his visa application asking if, *inter alia*, he had ever been convicted,

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[2] For this reason, neither *United States* v. *Scharton*, 285 U.S. 518, nor *United States* v. *Noveck*, 271 U.S. 201, dealing with the issue of whether fraud was an element of the offense for the purpose of the tolling of the statute of limitations, is in point.

petitioner replied "None." The Government contends that with this answer petitioner misrepresented a material fact in violation of 8 U.S.C. 1182(a)(19). Petitioner contends that if his conviction did not involve moral turpitude it would not have been sufficient, even if disclosed, to justify the refusal of a visa; and that therefore the conviction was not a material fact which petitioner was under a duty to disclose (Pet. 15).

As pointed out above, petitioner's conviction did involve a crime of moral turpitude, and it was therefore the misrepresentation of a material fact when petitioner failed to disclose it.

Even if we assume, however, that the crime did not involve moral turpitude, petitioner's conviction was still a material fact which he was under a duty to disclose. *Duran-Garcia* v. *Neelly*, 246 F. 2d 287 (C.A. 5); *Landon* v. *Clarke*, 239 F. 2d 631 (C.A. 1); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (C.A. 2). The significant point is that the officers charged with issuing visas were prevented by petitioner's misrepresentation from investigating and making a determination of whether the crime of which petitioner was convicted involved moral turpitude. A truthful answer would have required the officers to make such a determination before they issued the visa.[3]

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[3] Petitioner's contention is not strengthened by his plea of *nolo contendere*. Whatever the effect of that plea may be, it has nothing to do with the question asked of petitioner on his application for a visa. The question was concerned with merely determining if it was a fact that petitioner had been convicted of a crime. To this petitioner falsely answered "None."

United States ex rel. Iorio v. *Day*, 34 F. 2d 920 (C.A. 2) and *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263 (C.A. 7), are not opposed to this view. These cases were recently distinguished in *Ablett* v. *Brownell*, 240 F. 2d 625 (C.A. D.C.). In both cases, said the court, the aliens had misrepresented facts which, if they had told the truth, would nevertheless have entitled them to receive visas immediately. There was no indication, as in the present case, that truthful answers would have prompted the officials to withhold a visa pending investigation.

3. Petitioner contends that the phrase "crime involving moral turpitude" lacks a sufficiently definite meaning to afford a constitutional standard for his deportation. On this point, the Court's decision in *Jordan* v. *DeGeorge*, 341 U.S. 223, is controlling. There the Court held that the phrase "crime involving moral turpitude" was sufficiently definite to satisfy constitutional standards.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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